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Liability of Public Officers to Private Actions for Neglect of Official Duty

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II. LIABILITY OF PUBLIC OFFICERS TO PRIVATE ACTIONS FOR NEGLECT OF OFFICIAL DUTY.

A public office is a public trust. The incumbent has a property right in it, but the office is conferred, not for his benefit, but for the benefit of the political society. The duties imposed upon the officer are supposed to be capable of classification under one of three heads: the legislative, executive, or judicial; and to pertain, accordingly, to one of the three departments of the government designated by these names. But the classification cannot be very exact, and there are numerous officers who cannot be classified at all under these heads. The reason will be apparent if we name one class as an illustration. Taxing officers perform duties which in strictness are neither executive nor judicial, though in some particulars they merely execute the orders of superiors, and in others they judge for themselves what is to be done. But sometimes, also, their duties partake of the legislative. All such officers are usually called administrative, while inferior executive officers are designated ministerial.

All offices are established and filled on public considerations, but some of the officers are expected to perform duties which specially concern individuals, and only indirectly concern the public. We may illustrate here by the case of sheriff. This officer serves criminal process, arrests and confines persons accused of crime, etc., but he serves civil process also. The nature of the duty suggests the remedy in case of neglect. If the duty neglected is a duty to the state, he is amenable to the state for his fault; while for the neglect of private duties, only the person who is injured may maintain suit. But, as a general thing, it is only against ministerial officers that an action will lie for breach

of duty. The reason generally assigned is that, in the case of other officers, it is inconsistent with the nature of their functions that they should respond in damages for failure in satisfactory performance. In many cases this is a sufficient reason, but in others it is inadequate.

If we take the case of legislative officers, their rightful exemption from liability is very plain. Let it be supposed that an individual has a just claim against the state which the legislature ought to allow, but neglects or refuses to allow. Here may be a moral, but can be no legal, wrong. The legislature has full discretionary power in all matters of legislation, and it is not consistent with this that the members should be called to account in the courts for their acts and neglects. Discretionary power is, in its nature, independent; to make those who wield it liable to be called to account by some other authority is to take away discretion and destroy independence. This is as true of inferior legislative bodies—such as boards of supervisors, city councils, and the like—as of state legislatures. The courts may put them in motion sometimes, when they neglect or refuse to act, but cannot require them to reach particular conclusions, nor visit them with damages because they do not. It is only when some particular duty of a ministerial character is imposed upon a legislative body, which its members are required to perform, and in regard to which no discretion is allowed them, that there can be a private action for neglect. Such duties are sometimes imposed upon subordinate boards, like supervisors or county commissioners, and their members made personally responsible for performance.

Passing to the class of executive officers, the rule is still the same. The governor of the state is vested with a power to grant pardons and reprieves, to command the militia, to refuse his assent to laws, and to take the steps necessary for the proper enforcement of the laws. But neglect of none of these can make him responsible in damages to the party suffering therefrom. No one has any legal right to be pardoned, or to have any particular law signed by the governor, or to have any definite step taken by the governor in the enforce-

ment of the laws. The executive, in these particulars, exercises his discretion, and he is not responsible to the courts for the manner in which his duties are performed. Moreover, he could not be made responsible to private parties without subordinating the executive department to the judicial department; and this would be inconsistent with the theory of our institutions. Each department, within its province, is independent.

Taking next the case of the judicial department, and still the same rule applies. For mere neglect in strictly judicial duties no action can lie. A judge cannot be sued because of delaying his judgments, or because he fails to bring to his duties all the care, prudence, and diligence that he ought to bring, or because he decides on partial views and without sufficient information. His selection for his office implies that he is to be governed in it by his own judgment; and it is always to be assumed that that judgment has been honestly exercised and applied. But, nevertheless, all judges may have duties imposed upon them which are purely ministerial, and where any discretionary action is not permitted. An illustration is to be found in our *habeas corpus* acts. These, generally, make it imperative that a judge, when an application for the writ is presented which makes out a *prima facie* case of illegal confinement, shall issue the writ forthwith; and the judge is expressly made responsible in damages if he fails to obey the law. A similar liability would arise if a justice of the peace were to refuse to issue a summons when it was lawfully demanded, or an execution on a judgment, and the like, because here the duty is merely ministerial.

But, although it is plain enough, in these cases of discretionary powers, that there should be no individual liability, there are many cases, in which the powers are not discretionary, where the exemption is equally clear. The reason based on the nature of the powers is, therefore, found to fail in these cases, and we must look for something further. And, looking further, we shall probably be able to find a general rule by which all cases may be determined. That rule seems to be this: that, if the duty which the official authority

imposes upon an officer is a duty to the public, a failure to perform it, or a wrongful performance, must be a public, not an individual, wrong; while if the duty is a duty to the individual, then a failure to properly perform it may give rise to an individual action.

Now, discretionary powers almost always impose only public duties. How plain this is in the case of the legislature. Members of any legislative body are not chosen to perform duties for individuals, but to perform duties to the state. The performance of these may benefit individuals, and the failure to perform them may prejudice individuals; but this is only incidental. Congress imposes taxes on some article of domestic and foreign manufacture; this benefits the home manufacturer, but the act is not supposed to be passed for his benefit, but for the benefit of the country. Congress passes an act removing taxes from another class of manufactures; this injures some one, but it violates no duty owing to any individual. The individual has no personal rights in the law whatever, and it is made or repealed without the necessity of considering his private interest in any manner. Congress passes a law allowing a private claim and ordering its payment; this benefits the claimant, but it is supposed to be passed in the interest of the whole country, and because it is for the public good that all just claims upon the nation should be recognized and provided for. If Congress should reject the claim, there is still the same presumption that the public interest has been consulted, and that the claim is rejected because it ought to be. In either case the duty imposed on the members of Congress—which was a duty to the public only—is supposed to have been performed.

So in the case of the judge. His doing justice as between two particular individuals, when they have a controversy before him, is not the end and object which were in view when his court was created and he appointed to a seat in it. Courts are created on public grounds; they are to do justice as between suitors, to the end that peace and order may prevail in the political society, and that rights may be preserved

and protected. The duty is public, and the end to be accomplished is public; the individual benefit or loss results from the proper and thorough, or improper and imperfect, performance of a duty for which his controversy is only the occasion. The judge performs his duty to the public by doing justice between individuals, or, if he fails to do justice between individuals, he may be called to account by the public, in such form and before such tribunal as the law may have provided. But the individual suffers no legal wrong from his neglect.

This principle does not apply exclusively to officers of high grade; it does not depend on the grade at all, but on the nature of the duty. This will appear if we take, as an illustration, the case of the policeman. His duty is to serve criminal warrants, to arrest persons who commit offences in his view, to bring night-walkers to account, and to perform various duties of a like nature. Within his beat he should watch the premises of individuals, and protect them against burglaries and arsons. But suppose he goes to sleep upon his beat, and, while thus off duty, a robbery is committed or a house burned down, neither of which could have happened had he been vigilant; who can bring him to account for this neglect of duty? Not the individual injured, certainly. He is not the policeman of the individual; he is not hired by him, paid by him, or controlled by him, and he owes no duty to him. The duty he owes is to the public—to the state, of which the individual member is only a fractional part, and incapable, as such, of enforcing rights which are not individual, but general. If a policeman fails to guard the premises of John Smith, the neglect is a breach of duty of exactly the same sort as when he fails to take John Smith to the lock-up for being drunk and disorderly; and if John Smith could sue him for the one neglect, so he could for the other. And it is proper to note here that in this instance the officer has not discretionary duties to perform, but those which are purely ministerial.

The same is true of officers having charge of the highways, and empowered to lay out, manage, and discontinue

them. They may decline to lay out a road which an individual desires, or they may conclude to discontinue one which it is for his interest should be retained. There is a damage to him, but no wrong to him. In performing, or failing to perform, a public duty, an officer has touched his interest to his prejudice. But the officer owed no duty to him as an individual; the duty performed or neglected was a public duty. An individual can never be suffered to sue for an injury which, technically, is one to the public only; he must show some special wrong to himself, and damage alone does not constitute a wrong.[1]

It may be said that the case of a highway commissioner who improperly opens or discontinues a road, to the prejudice of an individual, is like that of one who commits a public nuisance to the prejudice of an individual. In each case there is a public wrong and also a private damage. But the two cases differ in this: the common law imposes upon every one a duty to his neighbor, as well as to the public, not to make his premises a nuisance; but the duties imposed upon the road officer, in laying out and discontinuing roads, are to the public alone. Conceding that his action has failed to regard sufficiently the interests of individuals, still no private right of action is made out, because, there being no private duty, there is nothing for the individual to complain of except the breach of the public duty. But the state must complain of this, not individuals.

The classes of officers to whom the like principles apply are so numerous that we cannot pause to enumerate them all. One more may be mentioned. The quarantine officer is commanded to take certain steps to prevent the spread of contagion. He is culpable in a very high degree if he neglects so to do, because the duty is a public duty of the highest importance and value. He does neglect, and a thousand persons are infected in consequence. But not one of these persons can demand from the negligent officer a personal redress. The duty was laid on the officer as a public duty—

[1] Waterer v. Freeman, Hob. 266.

a duty to protect the general public; but the office did not charge the incumbent with any individual duty to any particular person. If one rather than another was injured by the neglect, it was only that the consequences of the public wrong chanced to fall upon him rather than upon another; just as the ravages of war may chance to reach one and spare another, though the purpose of the government is to protect all equally.[2]

But there are some offices which, though created for the public benefit, have duties devolved upon their incumbents which are duties to individuals exclusively. In other words, in these cases, instead of individuals being incidentally benefited by the performance of public duties, the public is to be incidentally benefited by the performance of duties to individuals. A case in point is that of the recorder of deeds. It is for the general public good that all titles should appear of record, and that all purchasers should have some record upon which they may rely for accurate information. But, although a public officer is chosen to keep such a record, the duties imposed upon him are usually duties only to the persons who have occasion for his official services. He is simply required to record, for those who apply to him, their individual conveyances, and to give to them abstracts or copies from the record if they ask for them and offer the legal fees. All these are duties to individuals, to be performed for a consideration; the public do not commonly enforce them, nor do they commonly punish the failure in performance as a public offence. But the right to a private action on breach of the duty follows of course. The breach is a wrong, and injury from it is presumed.

[2] This case may be usefully compared with that of the inspector of meats in the public markets. The duties are imposed upon that officer, not only for the protection of the public in general, but for the protection of each individual purchaser in the market; and, if one is injured by reliance upon the inspector, it may be admissible to hold the inspector liable to an individual suit. Hayes v. Porter, 22 Me. 37. See, also, Couch v. Steel, 3 El. & Bl. 402, in which an action against the master of a vessel for going to sea without medicines, contrary to law, was held sustainable by one injured by the want of them. See, also, Curdos v. Bozant, 1 La. An. 199.

Suppose the recorder refuses to receive and record a conveyance when handed to him with the proper fees; this is a clear wrong, and, as such, is actionable. Suppose he undertakes to record it, and, in so doing, commits an error which makes the conveyance appear of record to be something different from what it is; this, also, is a wrong, for his duty is to record it accurately. In this last case the question of difficulty would be, who is entitled to maintain the suit; or, in other words, who is the party that is wronged by the recorder's mistake.

The cases are not agreed on the question who should sustain the loss when the grantee in a deed has duly left it for record, and the recorder has failed to record it correctly. The question in such a case would commonly arise between the grantee in such a deed and some person claiming under a subsequent conveyance by the same grantor, which was first correctly recorded. In some cases it is held that the grantee in the first deed is not to be prejudiced by the recorder's error. The reason is thus stated by Breese, J.: The person seeking to take advantage of the error "is, in effect, claiming to enforce a statute penalty, imposed upon the grantee in the deed, by reason of his having omitted to do something the law required him to do to protect himself and preserve his rights. The law never intended a grantee should suffer this forfeiture if he has conformed to its provisions. The plaintiff claiming the benefit of this statute being, as it is, in derogation of the common law, and conferring a right before unknown, he must find in the provisions of the statute itself the letter which gives him that right. To the statute alone must we look for a purely statutory right. All that this law required of the grantee in the deed was that he should file his deed for record in the recorder's office, in order to secure his rights under the deed. When he does that, the requirements of the law are satisfied, and no right to claim this forfeiture can be set up by a subsequent purchaser. The statute does not give to the subsequent purchaser the right to have the first deed postponed to his if the deed is not actually recorded, but only if it is not filed

for record."[3] Here it is seen that the grantee in the deed has brought himself strictly within the letter of the statute, and has performed all that the statute, in terms, makes requisite for his protection.[4]

Where this doctrine prevails it is difficult to understand how the recorder can be responsible in damages to the grantee for anything more than has been paid him for making the erroneous record, unless, in consequence of something which subsequently takes place, an actual damage is suffered which can be shown. Such damage might, undoubtedly, befall if afterward he should negotiate a sale and find the erroneous record to stand in the way of its completion; but as the deed, if in existence, could be recorded over again on payment of the statutory fees, this cost would seem to furnish the measure of recovery. If, however, the deed were lost or destroyed, a second recording would be impossible, and the question of remedy might then be more serious. As the injury in such a case would result from the conjunction of two circumstances—first, the error in the record, and, second, the loss of the deed—the question of remote cause and proximate cause would be involved, and the conclusion might, perhaps, be that the proximate cause of damage was to be found in the subsequent facts, and not in the recorder's error.

On the other hand, there are many cases in which it has been decided that every one has a right to rely upon the record actually made as being correct, and that, if it is erro-

[3] Merrick v. Wallace, 19 Ill. 486, 497. Substantially the same doctrine has been declared by Drummond, J., in Polk v. Cosgrove, 4 Biss. 437, and Riggs v. Boylan, *ib.* 445. See, also, Mim v. Mim, 35 Ala. 23; Garrard v. Davis, 53 Mo. 322.

[4] There are several cases in which it has been decided that the failure of the recorder to index a deed as required by the statute could not affect the title of the grantee. Curtis v. Lyman, 24 Vt. 338; Commissioners v. Babcock, 5 Oreg. 472; Bishop v. Schneider, 46 Mo. 472; *s. c.*, 2 Am. Rep. 533. But this, also, must depend upon the phraseology of statutes. See Gwynn v. Turner, 18 Iowa, 1. In general, the provisions on the subject of index are probably made for the convenience of examination of records, and not for the protection of those whose deeds are recorded. See Schell v. Stein, 76 Pa. St. 398.

neous, the peril is upon him whose deed has been incorrectly recorded. The leading decision to this effect was made under a statute which provided that "no mortgage should defeat or prejudice the title of any *bona fide* purchaser unless the same should have been duly registered"—a provision very different from that in the statute of Illinois already in substance given. A mortgage of $3,000 was recorded as one of $300; and Chancellor Kent said of the statute: "The true construction of the act appears to be that the registry is notice of the contents of it, and no more, and that the purchaser is not to be charged with notice of the contents of the mortgage any further than may be contained in the registry. The purchaser is not bound to attend to the correctness of the registry. It is the business of the mortgagee, and, if a mistake occurs to his prejudice, the consequences of it lie between him and the clerk, and not between him and the *bona fide* purchaser. The act, in providing that all persons might have recourse to the registry, intended *that* as the correct and sufficient source of information; and it would be a doctrine productive of immense mischief to oblige the purchaser to look, at his peril, to the contents of every mortgage, and to be bound by them when different from the contents as declared in the registry. The registry might prove only a snare to the purchaser, and no person could be safe in his purchase without hunting out and inspecting the original mortgage—a task of great toil and difficulty. I am satisfied that this was not the intention, as it certainly is not the sound policy, of the statute."[5] Other cases to like effect are referred to in the note.[6]

Let us suppose that where such is the rule of law, a deed is so recorded that the record fails to describe the land

[5] Frost v. Beekman, 1 Johns. Ch. 288, 298. And see Beekman v. Frost, 18 Johns. 544.

[6] Baldwin v. Marshall, 2 Humph. 116; Lally v. Holland, 1 Swan, 396; Sanger v. Craigue, 10 Vt. 555; Shepherd v. Burkhalter, 13 Geo. 444; Chamberlain v. Bell, 7 Cal. 291; Parrett v. Shaubhut, 5 Minn. 323; Scoles v. Wilsey, 11 Iowa, 261; Miller v. Bradford, 12 Iowa, 14; Breed v. Conley, 14 Iowa, 269; Terrell v. Andrew County, 44 Mo. 309; Brydon v. Campbell, 40 Md. 331. See Kerr v. Russell, 69 Ill. 666.

actually conveyed, and that the grantor sells the land a second time to one having no knowledge of the prior conveyance, thereby cutting off the first conveyance. There would be, under such circumstances, a direct loss to the first grantee of the whole value of the land, and it would seem that he must be entitled to a remedy against some one for a remuneration. That he might treat the second conveyance by his grantor as one made in his interest, and sue and recover from him the amount received from the second grantee, we should say would be clear. This would be only the ordinary case of one affirming a sale, wrongfully made by another, of his property, and recovering the proceeds thereof—the familiar case of waiving a tort, and suing in *assumpsit* for the money received.[7] But in many cases such redress might be inadequate, because less than the value of the land was received on the second sale, and no reason is perceived why he might not sue in tort for the value of that which he has lost, if that promises more satisfactory redress. If one, knowing he has already conveyed away certain lands, gives a new deed which defeats the first, this is as gross and palpable a fraud as can well be conceived of; and, like the selling of property in market overt, though it may pass the title, it cannot protect the seller when called upon by the owner to account for the property the latter has been deprived of.[8] But the question of a remedy against the recorder would, in this case, as well as that before suggested, be complicated as a question of

[7] Lamine v. Dorrell, Ld. Raym. 1216; Bennett v. Francis, 2 B. & P. 554; Read v. Hutchinson, 3 Camp. 352; Mann v. Locke, 11 N. H. 248; Smith v. Smith, 43 N. H. 536; Jones v. Hoar, 5 Pick. 285; Glass Co. v. Wolcott, 2 Allen, 227; Gilmore v. Wilbur, 12 Pick. 124; Webster v. Drinkwater, 5 Me. 323; Foster v. Tucker, 3 Me. 458; Bank of North America v. McCall, 4 Binn. 374; Willett v. Willett, 3 Watts, 277; Pearsoll v. Chapin, 44 Pa. St. 9; Morrison v. Rogers, 3 Ill. 317; O'Reer v. Strong, 13 Ill. 688; Guthrie v. Wickliffe, 1 A. K. Marsh. 83; Sanders v. Hamilton, 3 Dana, 550; Stearns v. Dillingham, 22 Vt. 627; Elliott v. Jackson, 3 Wis. 649; Fuller v. Duren, 36 Ala. 73; Pike v. Bright, 29 Ala. 332; Barlow v. Stalworth, 27 Geo. 517; Budd v. Hiler, 27 N. J. 43; Welch v. Bagg, 12 Mich. 42; Johnson v. Reed, 3 Eng. 202; Foye v. Southard, 54 Me. 147; Tamm v. Kellogg, 49 Mo. 118.

[8] See Andrews v. Blakeslee, 12 Iowa, 577; Holmes v. Stout, 10 N. J. 409.

proximate and remote cause, and would require a consideration which, up to this time, it has never, so far as we are aware, received. Does the loss of the estate result from the error of the recorder? or does that merely furnish the occasion for another event, to which the loss is in fact attributable as the proximate cause? The question would be still further complicated if, before the second conveyance by the original grantor, the first grantee had himself disposed of the land, so that the loss would fall, not upon the party whose deed was defectively recorded, but upon one claiming under him.[9] Here the damage, instead of following directly the recorder's misfeasance, follows it only after two intermediate steps—a conveyance by the first grantee, and another by the first grantor, which has the effect to defeat it.

The recorder of deeds may also injure some person by giving him an erroneous certificate. The liability for this is clear if the giving of the certificate was an official act; otherwise not. It was an official act if it was something the person obtaining it had a right to call for, and which it was his duty to give. Thus, one has a right to call for copies to be made from the records, and for official statements of what appears thereon; and he is entitled to have these certified to him correctly. But he is not entitled to call upon the recorder for a certificate that a particular title is good or bad; and such a certificate, if given, would not be official. The reason for this is that a certificate to that effect must necessarily cover facts which the records cannot show; and a title may be good or be defective for reasons which cannot, under any recording laws, appear of record. Therefore, if the register certifies that a title is good, he only expresses an opinion on facts, some of which he may officially know, but others of which he cannot know as recorder, and, therefore, cannot officially certify to.[10]

But suppose the register's certificate to cover nothing he might not be required to certify officially, and, therefore, to be properly and strictly an official act, but incorrect, and

9 See Ware v. Brown, 2 Bond, 267.

10 Introduction to Cooley's Blackstone, p. xvii.

suppose the person who applies for and receives it is not injured by it, but a subsequent purchaser, to whom he has delivered it with his title deeds, is injured—has such subsequent purchaser a right of action against the recorder? In other words, as it is a duty the recorder owes to every one who may have occasion to rely upon his records, to see that they are correctly made, is it also his duty to every who may have occasion to rely upon his certificates, to see that they are correct also?

The difference between the two cases may be said to be this: that the records are for public and general inspection, and are required to be kept that all persons may have, by means of them, accurate information concerning titles, while the giving of a certificate concerning something recorded is a matter between the recorder and the person calling for it, and legally concerns no one else. The recorder knows that his records are to be seen, and titles to be made in reliance upon them; he is not bound to know that his certificate is for the use or reliance of any but the person who receives it, nor can he be supposed to give it for any other use. But, on the other hand, it may be replied that such certificates are usually obtained as satisfactory evidence of title in making sales, and they are expected to have their effect, not upon the person who receives them, but upon some one to whom, by means thereof, he may be enabled to effect a sale, or from whom he may obtain a loan. It is such a person, therefore, that may be supposed to be in view when the certificate is obtained, and an injury, if any occurs, would be likely to fall upon him, rather than upon his grantor or mortgagor. If, therefore, the erroneous certificate of the register would, as has been said, "make him liable to the party who has been injured by it,"[11] must it not make him liable to the party who, in reliance upon it, has been induced to deal with the title, rather than to one who, by means of it, has been enabled to realize or accomplish more than his real title would justify.[12]

[11] Agnew, J., in Schell v. Stein, 76 Pa. St. 398, 401.

[12] In Housman v. Girard Building, etc., Association, to appear in 81 Pa. St., the supreme court of Pennsylvania has recently decided that, for a false

The case of a postmaster may be instanced as that of an officer who owes duties both to the public and to individuals. In the main, his duties are to the public: he is to receive and forward mail to other offices; to keep correct accounts with the department, and, perhaps, with contractors; to draw money orders, etc. But, in respect to mail matter received at his office, at a certain stage a duty is fixed upon him in behalf of individuals. When the proper person calls for anything which is there for delivery, he must deliver it, and he is guilty of an actionable wrong if he refuses.[13] He would be liable also if, through his carelessness, the letter of an individual should be lost or destroyed while in his charge; nor is any reason perceived why the carrier would not be equally liable if, through his fault, a mail should be lost.[14] There is a separate and distinct duty as to each paper, letter, or package carried, and a breach occurs if, through negligence, any one fails to be safely carried and safely delivered.[15]

So the collector of customs owes to the merchant, whose goods pass through his hands, the obligation to appraise or inspect them with reasonable promptness, and deliver them on the duties being paid. A merchant might be ruined by needless delays in the performance of this duty, and the responsibility should be unquestionable.[16]

The case of judges of election is one in which duties to the public and to individuals are so united and combined

certificate of searches, the recorder of deeds is liable only to the party who employs him to make it. In that case the certificate was obtained by a party contemplating a loan on the property, and who actually made a loan, relying on the certificate, and was injured thereby.

[13] Lane v. Cotton, Salk. 17; Smith v. Powdich, Cowp. 182; Rowning v. Goodchild, 2 W. Bl. 908; Teale v. Felton, 1 N. Y. 537; *s. c.*, in error, 12 How. 284.

[14] Ford v. Parker, 4 Ohio (N. S.), 576; Maxwell v. McIlvoy, 2 Bibb, 211; Sawyer v. Corse, 17 Gratt. 230.

[15] Whitfield v. Le Despencer, Cowp. 754, 765.

[16] See Barry v. Arnaud, 10 Ad. & El. 646, 670. A supervisor, required by law to report a claim to the county board for allowance, is liable for neglect to do so, though in good faith he may believe the law invalid, and refuse on that ground. Clark v. Miller, 54 N. Y. 528.

that the question of remedy is often one of no little difficulty. The duty to hold the election, to manage it fairly, and to receive the votes of all qualified electors, is one imposed for the general interest of the state, and concerns its highest welfare. But its performance also concerns the individual; for the privilege of taking part in the electoral machinery of the state is supposed to be of great value to every elector, and, from the time of Ashby v. White,[17] it has been regarded as settled law that an action for damages might be maintained for a wrongful refusal by the officers to receive the elector's vote. The differences in the decisions have related to the circumstances under which the suit might be brought. If, as is the case in some states, the oath of the elector is made the test of his right to vote, it is conceded that an action will lie if the oath is taken and the vote refused;[18] and in some states it is held that, if the right depends on qualifications of which the election officers must judge, they will, nevertheless, be liable for a refusal to receive the vote, though no corruption be charged against them.[19] But in other states the usual protection which is given to judicial officers is extended to these, and they are held liable for depriving the elector of his privilege only where malice or corruption is charged and established against them.[20]

[17] 2 Ld. Raym. 938; *s. c.*, 1 Smith's Ld. Cas. 246.

[18] Spraggins v. Houghton, 3 Ill. 377; State v. Robb, 17 Ind. 536; Gillespie v. Palmer, 20 Wis. 544; People v. Pease, 30 Barb. 588; Goetchins v. Mathewson, 61 N. Y. 420.

[19] Lincoln v. Hapgood, 11 Mass. 355; Henshaw v. Foster, 9 Pick. 312; Capen v. Foster, 12 Pick. 485; Blanchard v. Stearns, 5 Metc. 298; Harris v. Whitcomb, 4 Gray, 433; Jeffries v. Ankeny, 11 Ohio, 372; Monroe v. Collins, 17 Ohio (N. S.), 665; Anderson v. Milliken, 9 Ohio (N. S.), 568.

[20] Jenkins v. Waldron, 11 Johns. 114; Wecherley v. Guyer, 11 S. & R. 35; Gordon v. Farrar, 2 Dougl. (Mich.) 411; Peavey v. Robbins, 3 L. Jones, 339; Caulfield v. Bulloch, 18 B. Mon. 494; Miller v. Rucker, 1 Bush, 135; Chrisman v. Bruce, 1 Duv. 63; Wheeler v. Patterson, 1 N. H. 88; Turnpike v. Champney, 2 N. H. 199; Rail v. Potts, 8 Humph. 225; Bevard v. Hoffman, 18 Md. 479; Elbin v. Wilson, 33 Md. 135; Friend v. Hamill, 34 Md. 298; Pike v. Megoun, 44 Mo. 492. See State v. Daniels, 44 N. H. 383, and Goetchins v. Mathewson, 61 N. Y. 420. In this last case the whole subject is fully and carefully examined, and the authorities analyzed.

But the mere failure or refusal to receive a vote when offered is only one of many ways in which an elector's right to have a voice in an election may be defeated. The following may be suggested:

The defeat of an election by the officer's failing to take some necessary preliminary action.

Permitting illegal votes to control the election.

Destruction of the ballots after they are received.

Falsely returning the result, whereby the majority are deprived of their rights.

In every one of these cases the legal voter who has sought to exercise his privilege and has failed, or who, after exercising it, has had his action nullified by the election officers, has suffered palpable wrong, the same in sort and degree as when his individual vote is wrongfully rejected. But there is no precedent of an action for an individual injury of this sort. The precedents go no further than this: to fix upon the election officers the duty, to the individual, to register his name—if registry is required—at the proper time and place if he presents himself, and to receive his vote if it is tendered when the polls are open for the purpose. Any further duty which these officers owe is a duty to the aggregate public, and the injury which one citizen suffers from failure to perform it is the same with that suffered by every other citizen similarly situated, and, therefore, as in the case of public offences which touch the general public alike, the neglect cannot support an individual action. If an election has actually taken place, and the officers attempt to deprive the person elected of his office, by false returns or otherwise, the law will afford him a remedy for the recovery of the office. But if an election has been prevented, it is not supposed possible to ascertain what the result would have been had it taken place, and, consequently, no individual redress is possible. The public is wronged, and, in a legal view, only the public.

There are many cases in which it has been decided that, in the case of specified public officers, the only duty they owed to individuals was to act with good motives and integ-

rity, but that an action would lie against them where malice and injury to an individual were the impelling motives of their conduct. Thus, members of a school board have been held liable for the malicious removal of a teacher.[21] So, a county clerk, it is said, may be held liable, to the party injured, for wilfully and maliciously approving an insufficient appeal bond.[22] In New Hampshire it is said that "surveyors of highways are liable in damages for any wanton, malicious, or improper acts in making and repairing highways;"[23] a very general statement, which we should suppose might require some qualification. Undoubtedly, if what the surveyors do amounts to a trespass, as where they throw surface waters upon adjoining lands, the party injured is entitled to his remedy, whether the motive to their action was good or bad; but it cannot always be true that a party dissatisfied with the repair of a highway which is entrusted to a board of public officers can charge malice as a ground for a private action. He should be able to show how his own estate is unnecessarily interfered with, or that its enjoyment is purposely diminished in a manner that makes his case exceptional.[24] In Connecticut it is held that a wharfmaster may be liable to a party injured by his order for the removal of a ship from a certain dock, if it could be shown that the order was given with a malicious purpose to cause injury.[25] But our own view is that the doctrine that a public officer, acting within the limits of his jurisdiction in the discharge of a discretionary duty, can be held liable upon an assumption that he has acted wilfully or maliciously, is an exceedingly unsatisfactory and dangerous one; and that those decisions are safest, and most consonant to public policy, which deny it

[21] Burton v. Fulton, 49 Penn. St. 157. See Hogga v. Bigley, 6 Humph. 236; Walker v. Hallock, 32 Ind. 239; Lilienthal v. Campbell, 22 La. An. 600; Harman v. Tappenden, 1 East, 555.

[22] Billings v. Lafferty, 31 Ill. 318. See Chickering v. Robinson, 3 Cush. 543; Tompkins v. Sands, 8 Wend. 462.

[23] Rowe v. Addison, 34 N. H. 306, 313.

[24] See Waldron v. Berry, 51 N. H. 136, where the New Hampshire and other cases are collected and analyzed.

[25] Gregory v. Brooks, 37 Conn. 365. See Brown v. Lester, 21 Miss. 392.

altogether. Motives are not always readily justified to the public, even in the cases where they have been purest; and the safe rule for the public is that which protects its officers in acting fearlessly, so long as they keep within the limits of their legal discretion.[26]

It has been decided in New York that a superintendent of canal repairs, who, having the means to make repairs, and being charged with the duty to do so, neglected to perform the duty, was liable for the damages of a party whose use of the canal was prevented or impeded in consequence.[27] But here the duty was imperative, and was not left to the officer's discretion. In the same state commissioners of highways who have funds for the repair of the public ways, but neglect to use them for the purpose, are, on like grounds, responsible to parties injured by the want of repair.[28] The duty in such cases is not discretionary, but imperative. It is also distributive—imposed for the benefit of the public, and also of each individual of the public who may have occasion to make use of the public ways; in that particular corresponding to the duty imposed upon railway companies to sound signals at street-crossings, as a warning to each individual who may have occasion to be passing that way.

The case of a sheriff is that of an officer upon whom the law imposes duties to individuals as well as to the public. In so far as he acts as a peace officer, individuals are concerned only that he shall commit no trespass upon their rights; but in the service of civil process he is charged with duties only to the parties to the proceedings. These he must perform at his peril, and although in many cases the duties are of great nicety, and require an investigation into

[26] See Sage v. Laurain, 19 Mich. 137. The case of assessors charged with malicious over-valuation is in point here, and the decisions which hold that they cannot be held liable seem to us right beyond question. Weaver v. Devendorf, 3 Denio, 117; Cooley on Tax. 552.

[27] Adsit v. Brady, 4 Hill, 630; Robinson v. Chamberlain, 34 N. Y. 389; Insurance Co. v. Baldwin, 37 N. Y. 648.

[28] Hover v. Barkhoof, 44 N. Y. 113. Compare Garlinghouse v. Jacobs, 29 N. Y. 297; Lynn v. Adams, 2 Ind. 143; Dunlap v. Knapp, 14 Ohio (N. S.), 64.

the facts, and the exercise of sound judgment and discretion, yet he is looked upon as a ministerial officer merely, and is supposed to be capable of ascertaining, beyond mistake, what his duty is, and of performing it correctly. The law, therefore, does not excuse his errors, though he may have been led into them honestly while endeavoring faithfully to perform his duty. A striking illustration of the severity of this rule may be found in the case where an identity of names leads him to serve his writ upon the wrong party;[29] or where he seizes the goods of the wrong party, but on such evidence as might have misled any one.[30] The same act or neglect of a sheriff may sometimes afford ground for an action on behalf of each party to the writ; as where, having levied upon property, he suffers it to be lost or destroyed through his negligence. In such a case the plaintiff may be wronged because his debt may be lost, and the defendant may be wronged because a surplus that would have remained after satisfying the debt is lost to him. The officer owed to each the duty to keep the property with reasonable care, and there is a breach of duty to each if he has failed to do so.[31]

The purpose of this paper being merely to indicate general rules, and not to go into particulars, the case of another class of officers may be referred to by way of illustration. We allude now to those whose duty is to cut drains for the draining of considerable tracts of land, and afterwards to keep them open for the public benefit. The position, duty, and responsibility of such officers, it may be well to say at the outset, are not always the same. Sometimes they constitute a corporate board, and then the act of one, if lawful,

[29] Jarmain v. Hooper, 6 M. & G. 847.

[30] Davies v. Jenkins, 11 M. & W. 755; Dunston v. Patterson, 2 C. R. (N. S.) 495.

[31] Jenner v. Joliffe, 9 Johns. 381, 385; Bank of Rome v. Mott, 17 Wend. 554; Bond v. Ward, 7 Mass. 123–129; Purrington v. Loring, 7 Mass. 388; Barrett v. White, 3 N. H. 210–224; Weld v. Green, 10 Me. 20; Franklin Bank v. Small, 24 Me. 52; Mitchell v. Commonwealth, 37 Pa. St. 187; Hartlieb v. McLane, 44 Pa. St. 510; Gilmore v. Moore, 30 Geo. 628; Banker v. Caldwell, 3 Minn. 94; Tudor v. Lewis, 3 Metc. (Ky.) 378; Abbot v. Kimball, 19 Vt. 551; Fay v. Munson, 40 Vt. 468.

is the act of the corporation. Sometimes they are officers of cities or villages, and then their acts are the acts of the municipal corporation that elects or appoints them, and may render such corporation liable. But sometimes they act directly under an independent statutory authority, subordinate to no corporation, so that their neglects are chargeable to no one but themselves as individuals. This last is the position usually occupied by persons chosen as drain commissioners by towns, counties, or other districts of territory; they are chosen by the voters of the district, because the statute prescribes that mode of selection, but they act independently of the people of the district afterwards.

There are various ways in which the failure of such an officer to perform his duties faithfully and promptly might result in damage or loss to individuals. *First*, it might delay the completion of a work which had been ordered, and thereby land might be left overflowed and useless which should have been drained. But it is impossible to count upon this as an individual injury, since what is lost is only an advantage the party expected to reap from an exercise of public authority—not something which has actually become his. It is to be compared to the loss, by a candidate, of an anticipated election, in consequence of a riot at the polls, or through fraudulent votes; it may be a hardship, but it can support no action, because it takes away only an uncertain expectancy, and not a vested right. It may also be compared to the case of one who is a deserving object of charity under the poor laws. Such a person, from his circumstances, may have a right to expect relief from the proper officer, and it will be the duty of the officer to give it if the case is deserving. But the officer's neglect cannot give a private right of action; for until something has, in some legal way, been specifically set apart for the pauper, so that in law it has become his property, he can have no legal right which the officer's neglect defeats. And so up to the time when, by the construction of a drain, individual rights have actually attached, the delay of the commissioner, in the view of the law, can be a matter only of public concern—not a private injury.

But when the drain is made, the benefits to private estates arise, or should arise, and then there may be complaint either, *first*, that the plan or execution of the work has not brought the benefit it should have brought; or, *second*, that by neglect of the officer the drain is impeded. In the first case there can be no right of action, because as yet everything is in expectancy. But if, when the drain is completed, it is suffered by negligence to be obstructed, and thereby private estates are injured, the right to redress by suit seems clear. There is a distinct duty incumbent upon the officer who is charged with keeping the drain open, which he owes to every person who would be injured by his neglect; and where damage concurs with a breach of this duty the right of action is complete. But this, of course, supposes the means in his hands for the purpose, as without this there can be no neglect.[32]

It has been said in a recent treatise of accepted value that "the liability of a public officer to an individual for his negligent acts or omissions in the discharge of an official duty depends altogether upon the nature of the duty as to which the neglect is alleged. Where his duty is absolute, certain, and imperative, involving merely the execution of a set task—in other words, is simply *ministerial*—he is liable in damages to any one specially injured, either by his omitting to perform the task, or by performing it negligently or unskilfully. On the other hand, where his powers are discretionary, to be exerted or withheld according to his own judgment as to what is necessary and proper, he is not liable to any private person for a neglect to exercise those powers, nor for the consequences of a lawful exercise of them, where no corruption or malice can be imputed, and he keeps within the scope of his authority."[33] But, if this is correct as a general rule, it is subject to a great many exceptions; for,

[32] This general principle is recognized by the following among many other cases: Parker v. Lowell, 11 Gray, 353; Childs v. Boston, 4 Allen, 41; Barton v. Syracuse, 37 Barb. 292; Wallace v. Muscatine, 4 Greene (Iowa), 373; Phillips v. Commonwealth, 44 Pa. St. 197; Hover v. Barkhoof, 44 N. Y. 113.

[33] Shear. & Redf. on Neg. § 156.

as is above shown, there are many cases in which the duty is absolute, certain, and imperative, and is also ministerial, in which no action will lie, because the duty is exclusively public. The case of election officers defeating an election is a conspicuous instance; the voters who lose the opportunity to deposit their ballots are allowed no private right of action, though their damage is the same, in kind and degree, with that of voters whose ballots are wrongfully refused when the polls are open. The reason we have already stated to be this: that the duty to prepare for and hold an election is a public duty exclusively, while the duty to receive ballots when the polls are open is one severally due to each individual elector. There are also numerous cases in which duties are entrusted to the judgment and discretion of officers, and where, nevertheless, actions are sustainable against them. We have referred to some of these. It is true, the decisions regarding them are not harmonious—some courts holding that the obligation the officer owes to the individual is only to discharge his duty with integrity and to his best judgment, and that he is liable to an action only when malice or corruption is established, while others admit some exceptions, and hold, especially in election cases, that the officer must, at his peril, concede to the individual his legal rights.[34] The true general rule, we conceive, may be stated thus: whenever an individual can show that he suffers an injury through the neglect of a public officer to respect and recognize some right which the law assures to him, he is entitled to some appropriate redress therefor; while for incidental loss which he may suffer in consequence of the neglect of purely public duties, he is entitled to no redress, because no right pertaining to him as an individual has been violated. And this is wholly independent of the circumstance that his loss or damage is or is not exceptional and special.

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[34] Lincoln v. Hapgood, 11 Mass. 350. Compare Tozer v. Child, 7 El. & Bl. 377.